II. Peach's Procedural Objections Are Meritless.

Because Peach cannot, and does not, deny the conflict discussed above, she ultimately falls back on the argument that the conflict is not properly presented here. That argument is demonstrably incorrect.

As an initial matter, Peach asserts that "[t]he question whether state or federal equitable estoppel law should apply to the determination whether a non-signatory can compel arbitration is not the question presented [in the petition for certiorari] and is not fairly comprised within it." Opp. 7. That assertion makes no sense.

The question presented here is "[w]hether the Appellate Court of Illinois erred, and deepened a conflict between and among state and federal appellate courts applying the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, by refusing to allow a non-signatory to compel arbitration under the very contract that forms the basis for the non-signatory's alleged liability." Pet. i. That question necessarily and obviously comprises the subsidiary question of what substantive law applies in the first place, since it is impossible to determine whether the state court "erred"—much less "deepened a conflict between and among state and federal appellate courts"—without knowing what law governs. Accordingly, the choice-of-law issue is manifestly comprised within the question presented. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995) (citing cases); S. Ct. Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

Peach next tries a variation on this theme by arguing that "the question whether state or federal estoppel law applies was not preserved below." Opp. 8. That argument is both legally irrelevant and factually meritless.

As a legal matter, there is no question that the court below *actually addressed* the choice-of-law question, so that the question is indisputably presented for this Court's review.

"Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state courts is considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised." Robert L. Stern *et al.*, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002). Because the court below specifically and unequivocally held that equitable estoppel under the FAA is to be determined by reference to state, not federal, law, *see* Pet. App. 9a (citing *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542-43 (Ill. App. Ct. 2004)), and that holding conflicts with decisions by other federal and state appellate courts, this Court both can and should review the issue and resolve the conflict.

In any event, as a factual matter, CIM most certainly did raise the federal issue below. Indeed, CIM moved for arbitration under the FAA, a federal statute. Peach asserts that "CIM's initial memorandum in support of its motion to compel arbitration did not mention equitable estoppel, much less argue about the applicable law." Opp. 8. But *of course* CIM's opening brief in support of its motion to compel arbitration in the state trial court did not address equitable estoppel, because that doctrine is a response to a defense (CIM's non-signatory status) that Peach herself had not yet invoked. Once Peach opposed arbitration on that ground, CIM responded that Peach was equitably estopped, and cited the federal cases (applying federal equitable estoppel law) noted above. *See* Reply App. 10-11a & n.1.

Indeed, CIM specifically argued in the state trial court that "*both* Illinois *and federal law* compel arbitration in light of plaintiff's agency theory," and in support of argument noted that "the two [state court] cases cited by plaintiff do not abrogate Illinois or federal law, nor do they address the principle of equitable estoppel applied by several Circuit Courts of Appeal and other courts as discussed above." *Id.* at 12-13a

(emphasis added; capitalization modified). It is simply not true that CIM "relegated mention of the federal circuit court cases on which it focuses so heavily now to a 'see also' footnote," Opp. 8: rather, CIM dropped the footnote to highlight all of the additional federal appellate authority only *after* citing the lead Seventh Circuit case on point, *Hughes*, in the text. Reply App. 10-11a & n.1. Indeed, *Peach herself* specifically acknowledged below that "CIM claim[s] that the [non-signatory] issue [is] governed by a *federal* common law of contracts," whereas Peach "argue[s], instead, that the ability of a non-signatory to enforce the arbitration rights of its agent must be determined under traditional state law contract principles—here, under Illinois contract law." *Id.* at 2a (emphasis in original); *see also id.* at 4a ("CIM says that it does not matter if Illinois law would treat arbitration agreements the same as other contracts; CIM says federal law should govern anyway.").

Peach thus cannot, and in fact does not, deny that CIM presented its federal-law argument in the state courts below. Rather, as Peach acknowledges, CIM argued below "that its [equitable estoppel] theory was in line with *both* federal and Illinois law." Opp. 8 (emphasis added). By so doing, of course, CIM manifestly preserved its federal-law argument: CIM obviously did not have to argue that state law *differed* from federal law to preserve the argument that federal law required the court to compel arbitration. Peach's assertion that this Court "does not have jurisdiction to decide" the question presented in this case, *id.*, is thus inexplicable.

Finally, Peach errs by challenging CIM's alternative argument that the courts below violated the FAA *even if* state law governed the non-signatory issue by applying such law in a manner discriminatory toward arbitration. *See* Pet. 15-16. CIM's assertion that "[t]his quarrel over state law ... does not raise a federal question," Opp. 6, is manifestly incorrect: as noted in the petition, the discriminatory application of state law to arbitration agreements violates the FAA as a matter of

federal law, *see* Pet. 16 (citing *Doctor's Assocs.*, 517 U.S. at 687). And again, that issue is most definitely "comprised by the question presented" in the petition, Opp. 6, because that question involves the right of "a non-signatory to compel arbitration" under the FAA, Pet. i, and the state court denied that right through the discriminatory application of state law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

SCOTT W. FOWKES
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601

CHRISTOPHER LANDAU
Counsel of Record
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

May 26, 2005

APPENDIX

REPLY APPENDIX CONTENTS

Document **Page**

Supplemental Brief of Plaintiff-Appellee Armettia Peach,
Appellate Court of Illinois,
(May 12, 2004) 1a

Defendant CIM Insurance Corporation's Reply Memorandum
of Law in Support of its Motion to Compel Arbitration and to
Stay Litigation,
Third Judicial Circuit Court, Madison County, Illinois
(Jan. 10, 2003) (excerpt) 9a

No. 5-03-0684

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ARMETTIA PEACH, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. CIM INSURANCE CORPORATION, Defendant-Appellant.	Appeal from the Circuit Court of the Third Judicial Circuit of Illinois, Madison County, Illinois Case No. 02 L 1253 Honorable Nicholas Byron Judge Presiding

SUPPLEMENTAL BRIEF

During oral argument, the panel asked if the recent decision of the Supreme Court of Illinois in *Borowiec v. Gateway 2000*, 2004 WL 636562 (Ill. 2004), impacted upon the resolution of any pending issue in this appeal. The answer is—Yes.[1]

In *Borowiec*, the Supreme Court considered whether the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act barred arbitration of a consumer's claims under the Act. The Court held that the Magnuson-Moss Act does not bar arbitration of such claims. Dissimilarly, the appeal now before this Court does not involve claims under the Magnuson-Moss Act or, for that matter, under any federal

[1] Plaintiff's recent request for a transcript of the oral argument was denied. In the absence of a transcript, which would have confirmed the specific context in which the Court inquired about the *Borowiec* decision, Plaintiff shall attempt to address any and all points that could have any conceivable relevance to the case at bar.

statute. The instant appeal also does not involve any contention by Plaintiff that any particular statutory scheme granted Plaintiff a substantive right to a judicial forum that would be violated by compulsory arbitration. Therefore, at first glance, *Borowiec* does not appear to be relevant to the primary issues in the instant appeal.

The instant appeal *does* involve two over-arching issues. The first issue is whether CIM may enforce the arbitration agreement in this case even though it is not a signatory to that agreement. *Borowiec* does not address non-signatory rights at all. The second issue is whether the arbitration agreement itself is unconscionable. In *Borowiec*, the Court expressly declined to address the plaintiff's claims that the arbitration provision was unconscionable. Thus, upon cursory review, *Borowiec* again does not appear to be relevant to the primary issues in the instant appeal.

Looking deeper, however, *Borowiec* may be instructive on some important underlying issues that overlap in the case at bar.

The panel's inquiry regarding *Borowiec* occurred during Plaintiff's counsel's discussion of the non-signatory issue. Plaintiff's counsel was recounting the historical underpinnings of the FAA, observing that the FAA was intended to correct longstanding judicial discrimination against arbitration agreements, and to place arbitration agreements on an equal footing with other contracts, but otherwise to leave arbitration agreements to governance under state contract law. Plaintiff's counsel then suggested that CIM's argument on the non-signatory issue was inconsistent with the intent of the FAA because CIM claimed that the issue was governed by a *federal* common law of contracts that applied *different* rules to the construction and enforcement of arbitration agreements than to any other types of contracts. Plaintiff's counsel argued, instead, that the ability of a non-signatory to enforce the arbitration rights of its agent must be determined under traditional state law contract principles—here, under Illinois contract law.

Finally, Plaintiff's counsel argued that there is no precedent in Illinois for a principal to enforce the contractual rights of its agent under circumstances such as are presented in this case, and that the adoption of such a rule in this case, applicable only to arbitration agreements but not to other types of contracts, would itself be inconsistent with—and possibly violative of—the FAA. *Borowiec* is not to the contrary.

The *Borowiec* Court itself acknowledged the same, basic legislative history and statutory purpose of the FAA, stating:

> Congress enacted the Arbitration Act in 1925 to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.

Id. at *4 (citations and quotations omitted). Quoting U.S. Supreme Court precedent, the *Borowiec* Court went on to observe that, absent disparate treatment of arbitration agreements *vis-à-vis* other types of contracts, state law governs issues relating to the validity, revocability and enforceability of arbitration agreements:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Id. at *5 (citations and quotations omitted). Finally, in language that is consistent with Plaintiff's position on the proper resolution of the non-signatory issue in this case, the *Borowiec* Court said:

> A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the FAA].

Id. (citations and quotations omitted). *Borowiec* thus stands for two important propositions: first, that state law governs issues regarding the enforceability of arbitration agreements as long as that state law treats arbitration agreements the same as contracts generally; and second, that a state-law rule that treats arbitration agreements in a special or different manner violates the FAA.

These two propositions are irreconcilable with CIM's position in this case. CIM says that it does not matter if Illinois law would treat arbitration agreements the same as other contracts; CIM says federal law should govern anyway. That is not consistent with the *Borowiec* decision. CIM also seems to say that, even if this Court would not allow a non-signatory to enforce a traditional contract under the circumstances presented in this case, the Court should allow non-signatory enforcement here *because* this case involves an arbitration agreement. *Borowiec* specifically forbids such different treatment for arbitration agreements.

Presumably, CIM would attempt to draw this Court's attention to that part of the *Borowiec* decision in which the Supreme Court suggested that, where all federal appellate courts are uniform in their resolution of an issue of federal statutory law, a state supreme court should follow suit. *Id.* at *11. CIM would then argue that all federal appellate courts that have considered the issue have held that there is a federal common law developed under the FAA which allows non-signatories to enforce arbitration agreements, and CIM would suggest that, as indicated in *Borowiec*, this Court should now follow suit. This anticipated argument would be flawed for at least three reasons.

First, the issue in *Borowiec* involved the interrelationship between two federal statutory schemes—*i.e.*, the Magnuson-Moss Act and the FAA—not the interrelationship between a federal statutory scheme and state jurisprudence. It is one thing to say that state courts should defer to federal appellate determinations regarding the former. It is another thing to

suggest that state courts should abdicate their own state's jurisprudence, not because it is the right thing to do, but because one or more federal appellate courts say so. *Borowiec* does not support such blind deference.

Second, and as discussed above, the FAA specifically anticipates that state law will govern issues concerning the validity, enforceability and revocability of arbitration agreements, provided that such issues are resolved in accordance with the state's traditional contract law principles, and not on grounds unique to arbitration agreements. Thus, the FAA specifically commits the resolution of the issue under consideration here to the jurisprudence of the State of Illinois and its courts. It is, therefore, absurd to suggest that, under *Borowiec*, this Court should ignore that responsibility and simply follow foreign decisional law. *Borowiec* neither commands nor even supports such an abdication of this Court's judicial responsibility.

Third, and as noted by Plaintiff's counsel during oral argument, not all federal appellate circuits agree that the FAA provides a basis for allowing a non-signatory to enforce an arbitration agreement. Recently, in *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679 (Fed. Cir. 2003) (copy attached hereto as Exhibit #1), the Federal Circuit noted that the FAA governs arbitration agreements and the signatories to them; it does not govern the rights of a party who is not a signatory to an arbitration agreement but seeks to benefit from it anyway. *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. 2003). Specifically, the court in *DSMC* held as follows:

> *Convera's motion to compel was expressly based on principles of equitable estoppel.* Convera contended that the relation between DSMC's claims against it and DSMC's claims against NGTL was such that DSMC should be compelled to arbitrate the former along with the latter.

Section 4, however, applies only to an "alleged failure ... to arbitrate under a written agreement for arbitration"—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should. Convera argued that the DSMC/NGTL contract "satisfies the written arbitration agreement requirement," Convera's Mem. Supp. Mot. to Compel, at 6, but Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here—the one between DSMC and NGTL. *The motion is instead based on an effort to expand DSMC's obligation beyond the terms of that written agreement pursuant to principles of equitable estoppel. As appellants acknowledge, "[t]he doctrine of equitable estoppel . . . by definition applies where there is no written contract between the parties*...." Reply Br. at 6.

Convera recognizes that there is no precedent from this court compelling a party to an arbitration agreement to arbitrate with a non-signatory on the basis of equitable estoppel, *see* Appellants' Br. at 22, but cites cases from other circuits that have done so. Those cases typically did not address jurisdiction under Section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non-signatories. We need not and do not decide whether such an effort can ever succeed. *What we do decide is that an effort to compel arbitration in*

> *such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA.*

Id. at page 684 (emphasis added). Therefore, to the extent that CIM and all of its cited cases rely on the FAA as the basis for deriving and applying a non-signatory right to enforce arbitration agreements, they are simply wrong. State law governs that issue, and Illinois law does not support CIM's ability to enforce the arbitration agreement under the circumstances in this case.

Finally, *Borowiec* is also relevant to Plaintiff's claim that the arbitration agreement is cost-prohibitively unconscionable, and to CIM's response that it may moot that issue by agreeing in this litigation to pay all costs of arbitration. The dissent in *Borowiec*, addressing an issue that the majority never reached, stated as follows:

> Gateway argues, in the alternative, that even if its binding arbitration provisions are unenforceable with respect to plaintiffs' warranty claims, they can still be applied to require arbitration of plaintiffs' non-Warranty Act claims. This argument is untenable. Because the Magnuson-Moss Warranty Act prohibits inclusion of mandatory binding arbitration provisions in warranties on consumer products, those provisions should not have been in the warranties extended to plaintiffs by Gateway. Because they should not have been included in the warranties, they have no force or effect. *We must treat them as if they do not exist. That is the consequence of finding them void and unenforceable. No principle of contract law permits us to excise the arbitration provisions from the warranties, where they are illegal, and restore them to the agreement in some other place in some other way for some other purpose.*

Id. at *27 (Rarick, J., Dissenting) (emphasis added). For the same reason in the case at bar, CIM's attempt to moot the cost-prohibitive issue by agreeing to pay all costs must fail. Simply stated, there is no principle of Illinois contract law that permits one party to unilaterally modify an otherwise unconscionable contract, in order to negate the unconscionable terms thereof, and thereby allow enforcement of the remainder. Although CIM's brief cites some foreign decisions in which the courts have allowed such unilateral novations in order to find arbitration provisions enforceable, the dissent in *Borowiec* confirms that Illinois contract law will not countenance such mischief merely to find a way to enforce arbitration.

Dated: May 12, 2004.

Respectfully submitted,

ARMETTIA PEACH,
Class Plaintiff,

By:_____
One of Her Attorneys

Paul M. Weiss
Tod A. Lewis
FREED & WEISS LLC
111 West Washington Street,
Ste 1331
Chicago, Illinois 60602

L. Thomas Lakin, #1561464
Bradley M. Lakin, #6243318
Daniel J. Cohen #6212574
THE LAKIN LAW FIRM, P.C.
300 Evans Avenue
P.O. Box 27
Wood River, IL 62095-1127
Attorneys for Plaintiff and Proposed Plaintiff Class

**IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

ARMETTIA PEACH, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	No. 02 L 1253
v.	)	Judge Nicholas G. Byron
CIM INSURANCE CORPORATION,	)	
Defendant.	)	

DEFENDANT CIM INSURANCE CORPORATION'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND TO STAY LITIGATION OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Stephen C. Mudge
Martin K. Morrissey
REED, ARMSTRONG, GORMAN, MUDGE & MORRISSEY
115 North Buchanan Street
P.O. Box 368
Edwardsville, IL 62025
Tel: (618) 656-0257

Scott W. Fowkes
Bevin M. Brennan
A. Katrine Wiechens
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
Tel: (312) 861-2000

Counsel for Defendant
CIM Insurance Corporation

INTRODUCTION

Plaintiff's opposition brief principally relies upon policies and case law from foreign jurisdictions that do not share Illinois' preference for enforcing conspicuous arbitration provisions. And significantly, plaintiff seeks to repudiate the agency allegations in her own Amended Complaint in order to escape enforcement of the arbitration provision by defendant CIM, the alleged principal that plaintiff asserts should be vicariously liable under the Retail Contract.

Plaintiff cannot have it both ways. She cannot rely on an agency theory to seek to hold CIM liable under the Retail Contract when it works to her advantage, and then repudiate her agency allegations and the arbitration clause in the Retail Contract when it works to her disadvantage. Indeed, as the Seventh Circuit has held, it would be "***manifestly inequitable***" to permit a plaintiff to claim that a defendant is liable under a contract but at the same time deny that the defendant is a party to the contract in order to avoid the arbitration clause. *Hughes Masonry Company, Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (party estopped from repudiating arbitration clause of agreement upon which it relies) (emphasis added). Other courts agree.[1]

---

[1] *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,*

Yet that is precisely what plaintiff Peach seeks to do here. Plaintiff's Amended Complaint asserts that CIM should be vicariously liable for representations made by its alleged agent Enterprise in the Retail Contract, even though CIM was not a party to the Contract. But in opposing CIM's Motion To Compel Arbitration, plaintiff asks the Court to disregard her agency allegations and to invalidate the one part of the Retail Contract that plaintiff finds unfavorable, the arbitration clause. In short, plaintiff is equitably estopped from shifting her allegations as the "winds of self-interest change." *See Department of Transp. v. Coe*, 112 Ill. App. 3d 506, 507, 445 N.E.2d 506 (4th Dist. 1983) ("Truth is not a weather vane. It does not veer when the winds of self-interest change.").

The remainder of plaintiff's arguments are merely public policy objections to a straightforward application of Illinois and federal arbitration law. This Court need not stray far from the undisputed facts and law established in the opening briefs:

---

206 F.3d 411, 418 (4th Cir. 2000) (when party has "consistently maintained that other provisions of the same contract should be enforced to benefit him," he is "equitably estopped" from claiming that the arbitration clause does not apply); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000), *cert. denied*, 531 U.S. 1013 (2000) (applying doctrine of equitable estoppel, court held that "a signatory to [an] agreement *cannot* ... 'have it both ways' it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory") (emphasis original); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) ("[E]quitable estoppel allows a nonsignatory to compel arbitration . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.") (internal citations and quotations omitted); *Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 540 (S.D.N.Y. 1977) ("To allow [a party] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

- Plaintiff concedes that each of her claims against CIM "arises out" of a written Retail Contract that contains a clear and conspicuous arbitration clause.

- Plaintiff concedes that settled Illinois law "embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes." *See Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 443, 530 N.E.2d 439, 443 (1988).

- Plaintiff concedes that under federal and Illinois law, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983); *see also* cases cited in CIM's Opening Brf. at 4 n.3.

- Plaintiff concedes that a non-signatory may invoke an arbitration clause. *See Caligiuri v. First Colony Life Ins. Co.*, 318 Ill. App. 3d 793, 800, 742 N.E.2d 750, 756 (1st Dist. 2000).

- Plaintiff concedes that this litigation should be stayed if the Court compels arbitration.

The principles and authorities compel plaintiff to arbitrate her claims here.

I. BOTH ILLINOIS AND FEDERAL LAW COMPEL ARBITRATION IN LIGHT OF PLAINTIFF'S AGENCY THEORY.

Plaintiff does not dispute that Illinois and federal courts have recognized that a non-signatory to a contract may invoke an arbitration clause under an agency theory. *See Caliguiri*, 318 Ill. App. at 800, 742 N.E.2d at 756; *Morrie & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 407 (7th Cir. 1990); *Stone Distrib. Co. v. Meyers*, 157 F.R.D. 405, 409 (N.D. Ill.

1994).[2] But plaintiff offers ***no*** Illinois or federal authorities to support her counter-argument that an agency theory "cannot defeat the parties' intent" to limit arbitration solely to the parties to an agreement. (Opp. at 3) The two Alabama cases cited by plaintiff do not abrogate Illinois or federal law, nor do they address the principle of equitable estoppel applied by several Circuit Courts of Appeal and other courts as discussed above. *See Carriage Homes v. Channell*, 777 So. 2d 83, 84 (Ala. 2000); *Parkway Dodge, Inc. v. Yarbrough*, 779 So. 2d 1205, 1209-10 (Ala. 2000). CIM, as Enterprise's alleged principal, has a right to invoke the arbitration clause in this case because all of plaintiff's claims against CIM arise from the contract containing the clause.

* * *

[2] *See also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3rd Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *Goldberg v. Focus Affiliates Inc*., 152 F. Supp. 2d 978, 983 (N.D. Ill. 2001) (Because the plaintiff's claims against the agent were substantively the same as his claims against the principal, the agent "is entitled to invoke the arbitration provision entered into by his principal.")

No. 04-1221

IN THE
Supreme Court of the United States

CIM INSURANCE CORPORATION,

Petitioner,

v.

ARMETTIA PEACH, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

SUPPLEMENTAL BRIEF FOR PETITIONER

SCOTT W. FOWKES
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601

CHRISTOPHER LANDAU
Counsel of Record
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

Counsel for Petitioner

January 5, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Petitioner respectfully files this supplemental brief to bring to the Court's attention several cases decided since the petition was filed some ten months ago. These new cases underscore the important and recurring nature of the issues presented, the widespread confusion among the lower courts on those issues, and the consequent need for this Court's guidance.

The petition presents the question "[w]hether the Appellate Court of Illinois erred, and deepened a conflict between and among state and federal appellate courts applying the Federal Arbitration Act ["FAA"], 9 U.S.C. § 1 *et seq.*, by refusing to allow a non-signatory to compel arbitration under the very contract that forms the basis for the non-signatory's alleged liability." Pet. i. To resolve that question, of course, it is necessary to determine as a threshold matter whether the FAA itself provides the answer as a matter of *federal* law, or whether the statute looks to *state* law on this issue.

As explained in the petition, the Illinois Appellate Court held that the matter is governed by *state* law. *See* Pet. App. 9a-10a (citing *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542 (Ill. App. Ct. 2004)); *see also American Ins. Co. v. Cazort*, 871 S.W.2d 575, 579 (Ark. 1994). That decision squarely conflicts with federal appellate cases holding that the matter is governed by *federal* law. *See, e.g., Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 & n.6 (5th Cir. 2004); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417-18 & n.4 (4th Cir. 2000); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986). This choice-of-law issue has immense practical importance because no fewer than

seven federal courts of appeals have concluded, apparently as a matter of federal law, that a non-signatory *can* compel a signatory to arbitrate where (as here) the signatory has sued the non-signatory under the very contract containing an arbitration agreement. *See* Pet. 1-2, 9 (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004); *Astra Oil Co. v. Rover Navigation, Inc.*, 344 F.3d 276, 279-81 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-98 (2d Cir. 1999); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981)). The Appellate Court of Illinois in this case, as in its previous decision in *Ervin*, expressly declined to follow these federal precedents as a matter of state law. *See* Pet. App. 9a-10a; *Ervin*, 812 N.E.2d at 542.

The Texas Supreme Court has wandered into this choice-of-law thicket twice since the petition in this case was filed, and unsurprisingly concluded that "it is not entirely clear what substantive law governs" the arbitration rights and obligations of non-signatories under the FAA. *In re Weekley Homes, L.P.*, No. 04-

0119, __ S.W.3d __, 2005 WL 2807410, at *2 (Tex. Oct. 28, 2005); *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738-39 (Tex. 2005). The court noted that because "[t]he FAA does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue," the lower state and federal courts are divided. *Id.* at 738; *see also id.* ("[C]ourts have applied both federal and state law to determine" the rights and obligations of non-signatories) (citing cases). In particular, the court explained, "[f]ederal courts of appeals ... have frequently applied federal substantive law" in deciding this issue. *Id.* (citing, *inter alia*, *Bailey*, 364 F.3d at 267 n.6; *Dominium*, 248 F.3d at 728; *International Paper*, 206 F.3d at 417 n.4). The Texas court, however, expressly rested its decisions "on state law," as "*informed by* persuasive and well-reasoned federal precedent." *Id.* at 739 (emphasis added); *see also Weekley Homes*, __ S.W.3d at __, 2005 WL 2807410, at *2 ("*Pending an answer from the United States Supreme Court*, we apply state law while endeavoring to keep it as consistent as possible with federal law.") (emphasis added).[1]

---

[1] State courts in Mississippi and Georgia have also looked to state law over the past year to analyze the arbitration rights and obligations of non-signatories under the FAA. *See B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 491-93 (Miss. 2005) (citing the Appellate Court of Illinois' decisions in this case and *Ervin*, and rejecting contrary federal authorities); *but see id.* at 495-96 (Smith, C.J., dissenting) (advocating federal approach); *LaSonde v. CitiFinancial Mortgage Co.*, 614 S.E.2d 224, 226 (Ga. App. 2005) (permitting non-signatory to compel arbitration under state law, and stating that "[f]ederal law provides *guidance* for determining the circumstances under which a nonsignatory may be bound by [arbitration] agreements") (emphasis added; internal quotation omitted).

On the other hand, federal courts continue to treat the issue as one governed by federal law, analyzing it without any reference to state law (and instead looking to federal cases from other States). *See, e.g.*, *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005); *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005); *cf. Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 761-72 (N.D. Ill. 2005) (Filip, J.) (applying federal law and specifically rejecting the Appellate Court of Illinois' contrary decisions in this case and *Ervin* as "in conflict with" the line of federal decisions noted above, including *Grigson* and *MS Dealer*).

Regardless of which side of the conflict is correct, this Court should resolve the issue whether the arbitration rights and obligations of non-signatories under the FAA are governed by federal or state law. As underscored by the Texas decisions noted above, the conflict presented by this case is open and notorious. *See Weekley Homes*, __ S.W.3d at __, 2005 WL 2807410, at *2; *Kellogg*, 166 S.W.3d at 738-39; *see also* Gary B. Born, *International Commercial Arbitration* at 667-68 (2d ed. 2001) (noting conflict among lower courts on whether federal or state law governs the rights and obligations of non-signatories under the FAA); Frank Z. LaForge, *Inequitable Estoppel: Arbitrating With Nonsignatory Defendants Under* Grigson v. Creative Artists, 84 Tex. L. Rev. 225, 226-28 (2005) (noting that decision below in this case conflicts with other federal and state lower-court decisions and that "[t]he Supreme Court has yet to render a decision addressing the matter"). If there is any area of the law where clarity is imperative, it is arbitration: after all, to spend time and money litigating about whether to litigate in the first place defeats the whole point of

arbitration. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). It is especially troubling that, as a practical matter, state courts are looking to state law in deciding the arbitration rights and obligations of non-signatories under the FAA, while federal courts are looking to federal law to decide that very same question. A party's substantive arbitration rights should not turn on the forum in which those rights are invoked, and this Court should not interpret the FAA to encourage and reward forum-shopping. *See, e.g., Allied-Bruce*, 513 U.S. at 271-72; *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

Finally, petitioner respectfully submits that this case warrants this Court's review regardless of the disposition of *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (argued Nov. 29, 2005). That case presents the question whether the federal severability rule announced in *Prima Paint*, 388 U.S. at 402-04, applies regardless of the nature of a plaintiff's state-law challenge to the underlying contract, and the state-law severability implications of that challenge. That question is not implicated here, and *Buckeye* will not resolve the distinct question whether federal or state law governs a non-signatory's rights and obligations under the FAA. Because the latter question is vitally important to arbitration, and because the lower courts are squarely divided on that question, this Court should grant review here to provide an answer.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

SCOTT W. FOWKES
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601

CHRISTOPHER LANDAU
Counsel of Record
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

January 5, 2006